Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

In Re Ronald E. Jarmuth, Petitioner

On Petition For Writ Of Mandamus
To The United States Court of Appeals For The 3rd Circuit

PETITION FOR WRIT OF MANDAMUS

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Question Presented

Whether the court of appeals abused it's discretion by refusing to grant Petitioner's unopposed 28 USC 1653 motion to amend his allegations of jurisdiction (in his complaint) to reflect the uncontroverted existence of jurisdiction through the diversity of the parties?

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In the Supreme Court of the United States

No.

RONALD JARMUTH
Petitioner

v.

JAMES FRINZI, ET AL

On Petition For Writ Of Mandamus
To The United States Court of Appeals For The 3rd Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the court of appeals denying (without explanation) petitioner's unopposed motion to amend his trial court complaint so as to assert the diversity jurisdiction which actually exists is at Pet. App. 1.

The order of the court of appeals denying (without explanation) petitioner's unopposed motion for reconsideration of this motion to amend is at Pet. App. 2.

The trial court's order dismissing petitioner's complaint is at Pet. App. 6.

JURISDICTION

The order of the court of appeals denying (without explanation) petitioner's unopposed motion to amend his trial court complaint so as to assert the diversity jurisdiction which actually exists was entered on April 10th, 2003 (Pet. App. 1).

The order of the court of appeals denying petitioner's unopposed motion for reconsideration was entered on May 28th, 2003 (Pet. App. 2).

This petition and brief were filed on June 9th, 2003.

The jurisdiction of this court is invoked under 28 USC § 1651.

On May 31st 2003, petitioner filed a motion with the court of appeals for an extension of time (in which to file appellate briefs) so as to file the petition for this writ of mandamus. At the time this petition was filed the court of appeals had not acted on the motion.[1]

OTHER AUTHORITY

The Supreme Court has authority to order the amendment of petitioner's allegations of jurisdiction per 28 USC § 1653.

STATEMENT

This petition is in aid of the Court's appellate jurisdiction.

The posture of the case is that it is currently in the United States Court of Appeals for the 3rd Circuit, on appeal of essentially a dismissal in the trial court for lack of jurisdiction on all counts. The case was dismissed prior to any discovery. Thus all allegations of petitioner were supposed to have been taken as fact.

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[1] It is believed that the court of appeals lacks jurisdiction to proceed further once a petition is filed with the Supreme Court, a higher appellate court.

If the jurisdictional allegation is amended to reflect the actual fact of diversity jurisdiction, the dismissal is essentially mooted and needless waste of time and expense by the parties and the court of appeals is avoided. The court of appeals has already shown, by it's refusal to allow an amendment to reflect the actual existence of diversity jurisdiction. Hence it is expected that the Third Circuit will reject allegations that the trial court should have inquired as to the obvious existence of diversity jurisdiction (before dismissing). Thus this straightforward federal issue, if allowed to stay unresolved, must go in a more complex form to the Supreme Court on a Petition for Writ of Certiorari.

Adequate relief cannot be obtained in any other form or from any other court.

The trial court dismissed on the basis of lack of subject matter jurisdiction (which had not been alleged by any of the defendants). This disposition occured without providing petitioner notice that the trial court was considering such a basis for dismissal. Diversity jurisdiction plainly existed as shown in the style of the case. Yet the trial court failed to provide an opportunity for petitioner to amend to assert that all counts were before the trial court on the basis of diversity. In dismissing, the trial court judge never examined the adequacy of the complaint in the context of state law. For example, Pennsylvania's wiretap law requires "2 party" consent,. Thus whether or not the wiretap was done for tortious purpose or in aid of a crime is irrelevant.

Petitioner sought to amend the jurisdictional allegation to assert diversity in the court of appeals by filing an unopposed motion. The motion was denied without explanation. Since the denial was contrary to the standard set by every cited case in every federal appellate court - including the United States Supreme Court - and since the fact of diversity was uncontroverted and so obvious, petitioner filed a motion for reconsideration which was likewise denied without explanation. Thus petitioner has

exhausted all remedies except petition to the United States Supreme Court.

Exceptional circumstances warrant the exercise of the Court's discretionary powers.

There are no other adequate remedies. Granting the writ is merited on the basis of the over-all economy of effort and money among litigants, lawyers and courts.

There has been a clear legal error resulting from the appellate court's substantial abuse of its discretion. The appellate court's denial of amendment when actual diversity exists and is uncontroverted is clearly erroneous as a matter of law. It subverts the purpose stated by Congress when it amended the statute into it's current form.

The appellate court's action manifests persistent disregard for both procedural or substantive law, and establishes a nonharmless precedent in the 3rd Circuit. It is contrary to the interpretation (as to 28 USC § 1653) of all other circuits, of the 3rd Circuit itself, and of the Supreme Court..

The underlying case is a tort action arising from the admitted (by defendants Frinzi and Waters) wiretapping of a conversation involving petitioner (plaintiff in the case below). The associated counts arise from defendants' subsequent use (by Frinzi and Waters) of the illegal tape for witness retaliation and intimidation, and in aid of child abuse (by Frinzi and Waters).

The complaint asserted subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367 (federal question and supplemental jurisdiction). The complaint also pointed (in both it's style and it's body) that the plaintiff resided in West Virginia and that all defendants resided in Pennsylvania. The undisputed fact is that the parties were and still are citizens of the states in which residence was asserted.

Petitioner is represented by attorney Joseph Schwerha IV in the trial court; is pro se in the court of appeals; and is

represented by attorney Ern Reynolds in the United States Supreme Court.

Each of the counts stated in the complaint rely on parallel – but not identical – state and federal statutes, as well as state common law[2]. Each count cited state statute by code number. Thus every count can be advocated on the basis of state statute and common law in the federal court if they are before the federal trial court on the basis of diversity jurisdiction.

ARGUMENT

In petitioner's complaint it was made clear that the plaintiff, an individual, resided in West Virginia and that the defendants, also individuals, resided in Pennsylvania (Pet. App. 4, ¶¶ 2,3 and 4). In petitioner's uncontroverted and unopposed motion to the court of appeals to amend the jurisdictional statement, plaintiff clarified stating not only that he is/was a citizen of West Virginia and that defendants were/are citizens of Pennsylvania (Pet.App. 9, ¶ 3b(2)) but also provided the text proposed to be used to amend to remedy the procedural error of using "resident" instead of "citizen" (a common error). Petitioner, referring to the existing complaint, noted that "As filed, the amount in controversy is at least $391,312.00." (Pet.App. 10, ¶ 3d(3)). Petitioner also provided the text which would amend the jurisdictional statement such as to add reliance on "28 U.S.C. §§ 1331, 1332 and 1367" (adding diversity) and asserting that

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[2] For example, while 18 USC 2520 clearly allows suit for interception, disclosure or use of information through wiretap, it is unclear whether there is a cause of action for procurement, a point raised by defendant Begg. But under 18 PC § 5703 the state law the statute states that "a person is guilty of a felony ... if he:... procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication" and under 18 PA § 5725 there is a civil cause of action against "Any person (who) ... procures any other person to intercept, disclose or use, such communication" which was not addressed in the trial court order of dismissal and which trumps the finding (in dismissing) that there was no cause of action against defendants for procurement.

the amount in controversy "exceeds $75,000." (Pet.App. 10, ¶ 3d(2)).

The failure to plead diversity where it plainly existed and where the amount in controversy exceeded $75,000 was a technical oversight.

Per 28 USC § 1653 Discretion to Amend Is With the Petitioner

FRCivP Rule 15a (Amendments) reads " party **may amend** the party's pleading once as a matter of course at any time before a responsive pleading is served". It is universally accepted that the plaintiff need not seek leave of the court and no motion need be filed.

The same permissive ("may") wording is used in 28 USC 1653: "Defective allegations of jurisdiction **may be amended**, upon terms, in the trial or appellate courts".

Where leave of the court or motion is required, it is set forth in the text of the rule. By way of example, FRCivP Rule 15a (Amendment) explicitly requires such leave if amendment is sought after responsive pleadings are filed: "Otherwise a party **may amend** the party's pleading **only by leave of court**".

"Upon Terms" Does Not Require A Court's Prior Approval of the Proposed Amendment

It has been held that the phrase "upon terms" "does not presuppose that an amendment may not be filed without permission first having been obtained from the court." It has been held that an amendment so filed (without prior motion to a court) is considered properly filed if the amendment properly cures a defective prior jurisdictional allegation (McGuigan v. Roberts, D.C.N.Y.1959, 170 F.Supp. 372).

The Petition is in accord with the Intent of Statute

When Congress amended the pre-existing section (June 25, 1948, ch.646, 62 Stat. 944) it expanded it's applicability

(see Historical Notes, Pet.App. 3). A requirement to seek leave of the court is explicitly omitted.

It has been universally held that Congress specifically intended that the intent of the statute was "to avoid dismissal on technical grounds" (Miller v. Davis, C.A.6 (Ky.) 1974, 507 F.2d 308; Brennan v. University of Kan., C.A.10 (Kan.) 1971, 451 F.2d 1287; Moore v. Coats Co., C.A.N.J.1959, 270 F.2d 410) and specifically when a pleading erroneously cites "resident" (Burnstein v. Columbia Broadcasting System, Inc., C.A.7 (Ill.) 1961, 291 F.2d 8; Texaco-Cities Service Pipe Line Co. v. Aetna Casualty & Surety Company, C.A.8 (Mo.) 1960, 283 F.2d 144; Powell, Inc. v. Abney, D.C.Tex. 1979, 83 F.R.D. 482) instead of "citizen" or does not assert a diversity actually present (Camacho v. Cove Trader, Inc., D.C.Pa.1985, 612 F.Supp. 1190; Howard v. DeCordova, Tex. 1900, 20 S.Ct. 817, 177 U.S. 609, 44 L.Ed. 908; Excello Corp. v. Connor, D.C.N.J. 1950, 10 F.R.D. 288).

When rejecting petitioner's attempt to amend, the court of appeals was fully aware that diversity existed, that the amount in controversy satisfied the threshold, and that the proposed amendment properly cited the diversity statute and remedied the technical errors of wording.

Broad and Liberal Allowance Intent of Congress Favors this Petition

It has been broadly held that the standard to be applied in considering motions to correct jurisdictional errors is very liberal. The 3rd Circuit itself has held that "leave of court to amend shall be 'freely given'" (Scattergood v. Perelman, C.A.3, 945 F.2d 618, 626-627). In support of the premise courts have held that the statute should be "liberally construed" (Miller v. Stanmore, C.A.5 (Tex.) 1981, 636 F.2d 986; McGovern v. American Airlines, Inc., C.A.5 (Tex.) 1975, 511 F.2d 653, rehearing denied 514 F.2d 1072), especially if such construction will enable a suit to proceed (Cox v. Livingston, C.A.2 (N.Y.) 1969, 407 F.2d 392; John Birch Soc. v. National Broadcasting Co., C.A.2 (N.Y.) 1967, 377 F.2d

194). Application of this standard to petitioner's case requires that the court order his jurisdictional allegations to be accepted as amended and that the case be remanded for further proceedings in the trial court. The denial by the court of appeals is contrary to both the intent of the statute and the established standard of it's applications.

Denial was Contrary to Public Policy

It has been held that failure to allow a plaintiff to avail himself of an alternative basis for jurisdiction when the basis originally plead lead to dismissal is contrary to public policy (Fidelity & Cas. Co. v. Reserve Ins. Co., C.A.9 (Cal.) 1979, 596 F.2d 914).

Duty of Court is to grant Amendment

It is the duty of a court, when it comes into the knowledge that jurisdiction is available through diversity, to allow such amendment (Howard v. DeCordova, Tex.1900, 20 S.Ct. 817, 177 U.S. 609, 44 L.Ed. 908).

It has been held that it is the duty of the Court before which amendment (of jurisdictional defects) is presented to allow an amendment "to cure the defect under 28 U.S.C. § 1653" and that if this is not permitted an appellate court is "shirking our review responsibility" and is working "an injustice" to a petitioner if the appellate court allows such a refusal to stand (In re First National Bank of Boston, No. 95-5008; USCA 11th Cir; 102 F.3d 1577; 10 Fla. L. Weekly Fed. C 589[3]).

Courts have held that it is their obligation to inquire into the actual jurisdictional facts (*Guarantee Nat'l Title Company v J.E.G. Associates*, No. 96-1089, C.A.7, 101 F.3d 57; Joseph J. Jacobs et al v Patent Enforcement Fund, Inc, No. 99-9237; C.A. 2, 230 F.3d 565.).

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[3] " and effectuated by our refusal to perform our review responsibility to the disadvantage of Bank of Boston, a litigant expecting the federal courts to review its case fairly. ... (failure to take action) would preserve and perpetuate similar abuses of discretion by district courts."

The Supreme Court has held that "federal courts have a 'virtually unflagging obligation'" to support the exercise of jurisdiction when it exists, whether properly plead or not.[4]

Proper Discretion of Court Did Not Include Denial in this Instance

The inclusion of the phrase "upon terms" in the language of 28 USC § 1653 which is lacking in FRCivP 15a is evident that the Courts have a role in the application of the statute. The role is that of gatekeeper relating to the technical application of the statute. In this instance the refusal of the court of appeals to allow petitioner to amend is not within the scope of the gatekeeper role as exemplified by case law.

The discretion of the court has been held to insuring that an amendment is filed on a timely basis, that the wording of the proposed amendment cures the technical errors in the original pleading, and that the errors sought to be cured are technical in nature and is not actually an attempt to create new jurisdictional facts.

1. It is within a court's discretion to set some time limit within which to file an amendment (Kern v. Standard Oil Co., C.A.Minn.1956, 228 F.2d 699, supplemented on other grounds 230 F.2d 954; Fry v. Layne-Western Co., C.A.8 (Mo.) 1960, 282 F.2d 97.). Instead of setting a reasonable time within which to amend, the court here refused any amendment at all.

2. It is proper for a court to require that it be allowed to scrutinize a proposed amendment prior to allowing it to be filed and to reject it if the text fails to cure the defective allegations of jurisdiction (John Birch Soc. v. National Broadcasting Co., C.A.2 (N.Y.) 1967, 377 F.2d 194; Illinois

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[4] Once such jurisdiction exists, federal courts have a "virtually unflagging obligation" to exercise it. *Moses H. Cone*, 460 U.S. at 15, 103 S.Ct. at 936 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976), in turn quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952))."

Terminal R. Co. v. Friedman, C.A.Mo.1953, 208 F.2d 675, rehearing denied 210 F.2d 229; Jackson v. Salon, C.A.1 (Mass.) 1980, 614 F.2d 15). Petitioner's proposed amendments fully correct the errors; the court's rejection, without explanation, failed to cite a continued defect not remedied by the text proposed by petitioner.

3. It is proper for a court to disallow amendments where the case, as filed, doesn't provide any jurisdictional facts for any basis of federal jurisdiction (Newman-Green, Inc. v. Alfonzo-Larrain, 111.1989, 109 S.Ct. 2218, 490 U.S. 826, 104 L.Ed.2d 893, rehearing denied 110 S.Ct. 12, 492 U.S. 932, 106 L.Ed.2d 627; Field v. Volkswagenwerk AG, C.A.3 (N.J.) 1980, 626 F.2d 293). Instant case is supportable by diversity.

4. It is proper for a court to reject an attempt to create new jurisdictional facts (Church of Scientology of Colorado v. U.S., D.C.Colo.I980, 499 F.Supp. 1085; Rockwell Intern. Credit Corp. v. U.S. Aircraft Ins. Group, C.A.9 (Ariz.) 1987, 823 F.2d 302; Moody v. Commercial Ins. Co. of Newark, New Jersey, N.D.Tex.1990, 753 F.Supp. 198.). In instant case diversity existed when the case was filed and continues.

Denial by Court of Appeals was an Abuse of Discretion

It has been held that it is an abuse of discretion for a court to reject, out of hand (as the court of appeals has done), a request to amend under 28 USC § 1653 (Etoile Le Blanc v Terry Cleveland, No. 98-9020; C.A.2, 248 F.3d 95).

Similarly, the refusal to permit amendment has been held an abuse of discretion and overturned when the facts and pleading (either in the original complaint, elsewhere in the record, or in a motion to amend) support an amendment under 28 USC § 1653 (Advani Enterprises Inc v Underwriters at Lloyds and Syndicate 735 , No 97-7664, C.A.2, 140 F.3d 157; In re First National Bank of Boston, No. 95-5008; C.A.11, 102 F.3d 1577; 10 Fla. L. Weekly Fed. C 589; Schlesinger, Secretary of Defense, Et Al, v Councilman, No. 73-662, U.S.S.C., 420 U.S. 738;95 S. Ct. 1300,43 L. Ed. 2d 591, 21 Fed. R. Serv. 2d (Callaghan) 1029).

To deny a petitioner an opportunity to correct defects in jurisdictional allegations has also been held an abuse of discretion (Penteco Corp. Ltd. Partnership 1985A v. Union Gas System, Inc., C.A.10 (Okl.) 1991, 929 F.2d 1519).

No Precedents Support the Denial of Petitioner's Request to Amend

There are no cases where a court's refusal (to allow an amendment so as to properly plead a diversity jurisdiction which actually exists) has been sustained.

The refusal, without explanation, of the Court of Appeals for the 3rd Circuit to permit petitioner to amend his unopposed jurisdictional allegation to reflect the actual fact of diversity jurisdiction is contrary to the precedents established by the:

1st Circuit: Jackson v. Salon, C.A.1 (Mass.) 1980, 614 F.2d 15;
2nd Circuit: (Advani Enterprises Inc v Underwriters at Lloyds and Syndicate 735, No 97-7664, C.A.2, 140 F.3d 157; Etoile Le Blanc v Terry Cleveland, No. 98-9020, C.A. 2, 248 F.3d 95; John Birch Soc. v. National Broadcasting Co., C.A.2 (N.Y.) 1967, 377 F.2d 194; Joseph J. Jacobs (Trustee of the Jacobs Family Trust) et al v Patent Enforcement Fund, Inc, No. 99-9237, C.A. 2, 230 F.3d 565;
3rd Circuit itself: J & R Ice Cream Corporation v California Smoothie Licensing Corporation, Nos. 93-5516 and 93-5547, C.A.3, 31 F.3d 1259, 1265; Scattergood v. Perelman, C.A.3 (Pa.) 1991, 945 F.2d 618;
5th Circuit: McGovern v. American Airlines, Inc., C.A.5 (Tex.) 1975, 511 F.2d 653, rehearing denied 514 F.2d 1072; Miller v. Stanmore, C.A.5 (Tex.) 1981, 636 F.2d 986;
7th Circuit: Burnstein v. Columbia Broadcasting System, Inc., C.A.7 (Ill.) 1961, 291 F.2d 8; Guarantee Nat'l Title Company v J.E.G. Associates, No. 96-1089, C.A.7, 101 F.3d 57; Lander Company v MMP Investments No. 96-2684, C.A.7, 107 F.3d 476; 42 U.S.P.Q.2D (BNA) 1393; Ross Brothers Construction Co. v International Steel Services, Inc.

and American Iron Oxide Company, No. 01-1578, C.A. 7, 283 F.3d 867;52 Fed. R. Serv. 3d (Callaghan) 271.
8th Circuit: Barclay Square Properties v. Midwest Federal Sav. and Loan Ass'n of Minneapolis, C.A.8 (Minn.) 1990, 893 F.2d 968; Fry v. Layne-Western Co., C.A.8 (Mo.) 1960, 282 F.2d 97; Texaco-Cities Service Pipe Line Co. v. Aetna Casualty & Surety Company, C.A.8 (Mo.) 1960, 283 F.2d 144;
9th Circuit: Fidelity & Cas. Co. v. Reserve Ins. Co., C.A.9 (Cal.) 1979, 596 F.2d 914; Rockwell Intern. Credit Corp. v. U.S. Aircraft Ins. Group, C.A.9 (Ariz.) 1987, 823 F.2d 302;
10th Circuit: Brennan v. University of Kan., C.A.10 (Kan.) 1971, 451 F.2d 1287;
11th Circuit: Belasco v. W.K.P. Wilson & Sons, Inc., C.A. 11 (Ala.) 1987, 833 F.2d 277; First Franklin Financial Corp v Gary McCollum, No. 97-6966, USCA 11th Cir; 144 F.3d 1362;
DC Circuit: District of Columbia ex rel. American Combustion, Inc. v. Transamerica Ins. Co., 1986, 797 F.2d 1041, 254 U.S.App.D.C. 374;
Supreme Court: Howard v. DeCordova, Tex. 1900, 20 S.Ct. 817, 177 U.S. 609, 44 L.Ed. 908; Newman-Green, Inc. v. Alejandro Alfonzo-Larrain, et al, No. 88-774; U.S.S.C. 490 U.S. 826, 109 S. Ct. 2218, 104 L. Ed. 2d 893.

The Supreme Court May Itself Permit the Sought Amendment

28 USC 1653 permits amendment of the jurisdictional allegations in any federal court, including the Supreme Court.

It has been held that the initial application to amend may be made at an appellate court (District of Columbia ex rel. American Combustion, Inc. v. Transamerica Ins. Co., 1986, 797 F.2d 1041, 254 U.S.App.D.C. 374; Eisler v. Stritzler, C.A.1 (Puerto Rico) 1976, 535 F.2d 148; Mantin v. Broadcast Music, Inc., C.A.Cal.1957, 244 F.2d 204). The availability of amendment under 28 USC 1653 continues even after a final judgment (Strain v. Harrelson Rubber Co., C.A.5 (Tex.) 1984, 742 F.2d 888)

It has been held that this interpretation includes applying for such an amendment to the Supreme Court (Molnar v. National Broadcasting Co., C.A.Cal.1956, 231 F.2d 684), as well as at any appellate court).

CONCLUSION

Diversity of the parties existed when the complaint was filed and continues. Diversity of citizenship is uncontroverted.

Petitioner properly applied under 28 USC § 1653 to amend to correct his jurisdictional allegations so as to plead diversity of citizenship. The application was unopposed and thus could not be taken as compromising or otherwise harming the other parties.

The proposed amendment was technically adequate and cures the defect by properly alleging citizenship and amount in controversy.

The opportunity for petitioner to amend his jurisdictional allegations is exactly what Congress had in mind when it enacted the original language of 28 USC §1653, and the 1949 amendment only liberalized that intent.

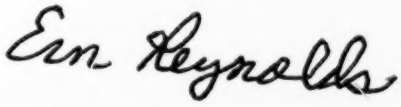
The refusal of the court of appeals to permit amendment without explanation was an extreme abuse of discretion.

The rejection of the application to amend sets a nonharmless precedent which is contrary to that established by at least nine of the appellate circuits and that of the Supreme Court, and is also a rejection by the 3rd Circuit of it's own precedents on the matter.

Failure to remedy this abuse of discretion at this time will result in a waste of effort and money among litigants, lawyers and courts.

A Writ of Mandamus should be issued, ordering that petitioner's complaint is held amended so as to reflect the existence of diversity jurisdiction, and directing remand to the trial court for further proceedings, or in the alternative ordering the United States Court of Appeals for the 3rd

Circuit to allow petitioner to amend his complaint to reflect the existence of diversity jurisdiction prior to the filing of appeal briefs in that court.



Ern Reynolds
Counsel of Record for This Petition
Ern Reynolds Prof. Corp.
2059 Westover Avenue S.W.
Roanoke, Virginia 24015-2311
540-343-6717; fax 540-343-8117

June, 2003

No.

IN THE
Supreme Court of the United States

RONALD JARMUTH

Petitioner

v.

JAMES FRINZI
KATHLEEN WATERS
TODD BEGG

On Petition For Writ Of Mandamus
To The United States Court of Appeals For The 3rd Circuit

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

Ern Reynolds
Counsel of Record for This Petition
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Original Order Denying Amendment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
November 27, 2002 D-20
No. 02-2630

RONALD E. JARMUTH,
Appellant
vs.
JAMES MICHAEL FRINZI, KATIE WATERS & TODD BEGG
(Western District of PA Civil No. 00-cv-02031)(GLL)

Present: ALITO, ROTH and RENDELL, Circuit Judges.

Appellant's Motion to Amend Trial Court Pleadings to Show Jurisdiction

Dana Moore
Dana Moore Case Manager
(267) 299-4927

See Motion Panel D-20

_____ ORDER _____

The foregoing motion is denied.

By the Court,

Circuit Judge

Dated: April 10, 2003
DMM/cc: Mr. Ronald E. Jarmuth
Sheryl R. Heid, Esq.
Scott R. Leah, Esq.

Order Denying Reconsideration

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

May 2, 2003
D-90

Docket No.02-2630

RONALD E. JARMUTH,
Appellant

vs.

JAMES MICHAEL FRINZI, KATIE WATERS & TODD BEGG
(Western District of PA Civil No. 00-cv-02031)(GLL)

Present: ALITO, ROTH and RENDELL, Circuit Judges.

Appellant's Motion for Reconsideration of Court's Order Dated April 10, 2003, which denied Appellant's Motion to Amend Trial Court Pleadings to Show Jurisdiction.

See Motion Panel D-20

ORDER

The foregoing motion for reconsideration of the Court's Order dated 4/10/03, denying appellant's motion to amend trial court pleadings to show jurisdiction is denied.

By the Court,

Circuit Judge

Dated: May 28, 2003
DMM/cc: Mr. Ronald E. Jarmuth
Sheryl R. Heid, Esq.
Scott R. Leah, Esq.

28 USC Sec. 1653. - Amendment of pleadings to show jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts

SOURCE
June 25, 1948, ch.646, 62 Stat. 944

HISTORICAL AND REVISION NOTES
Based on title 28, U.S.C., 1940 ed., Sec. 399 (Mar. 3, 1911, ch. 231, Sec. 274c, as added Mar. 3, 1915, ch. 90, 38 Stat. 956).

Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed. Changes were made in phraseology

Plaintiff's Complaint in Trial Court Prior to Dismissal

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

RONALD E. JARMUTH	)	
Plaintiff	)	No. 00-CV-2031
VS.	)	First Amended Complaint
JAMES MICHAEL FRINZI	)	JURY TRIAL DEMANDED
and	)	
KATIE (a.k.a. KATHLEEN)	)	
WATERS	)	
and	)	
TODD BEGG	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

...

PARTIES

2. The Plaintiff, RONALD E. JARMUTH, is an adult individual who at times relevant to this action **resided** at 1703 Lakeside Drive, Morgantown, **West Virginia** 26508.

3. Upon information and belief, the Defendants J Frinzi and Waters, **reside** together at House #2, Deer Lake Road, Chalk Hill, **PA** 15421. This is also the business address for defendant J Frinzi.

4. Upon information and belief, Defendant Begg **resides** on Valley Drive, Pittsburgh, **PA** 15215, and at times relevant hereto had a business address of 301 Grant Street, Floor 20, Pittsburgh PA 15219-1410.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over the subject matter of this action pursuant to **28 U.S.C. §§ 1331 and 1367.** Venue is proper in this judicial district pursuant to 28 U.S.C. §§1391(b). This Court has personal jurisdiction over each of the defendants.

...

28 Sec. 1291. - Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title

Trial Court Order Dismissing Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD E. JARMUTH,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-2031
JAMBS MICHAEL FRINZI,	)	
KATIE WATERS, and	)	
TODD BEGG,	)	
Defendants.	)	

ORDER

AND NOW, this day of May, 2002, upon consideration of defendant Begg's Motion to Dismiss (Document #261 and defendants Frinzi and Water's Motion to Dismiss [Document #281, IT IS HEREBY ORDERED that the motions are GRANTED.

BY THE COURT
GARY LANCASTER, J

cc: All Counsel of Record

Petitioner's Unopposed Original Motion in the Court of Appeals to Amend Jurisdictional Statement

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-2630
Jarmuth
Vs.
Frinzi

APPELLANT's MOTION TO AMEND TRIAL COURT PLEADINGS TO SHOW JURISDICTION

Filed By Appellant Ronald Jarmuth, Pro Se

1. **Relief Sought.** Appellant Ronald Jarmuth moves the Appellate Court for an order amending the trial court pleadings to show that the trial court has at all times had jurisdiction over the trial court complaint on the basis of diversity of the parties. Appellant further requests "Expedited Consideration", as granting this motion will dramatically alter the scope and nature of the issues which need to be briefed, and Appellant's brief and Appendix are due December 9th, 2002.

2. **Authorities.**

a. 28 USC 1653 permits a plaintiff to amend his trial court complaint at the appellate stage of proceedings to incorporate jurisdictional allegations which were lacking in the complaint.

> *"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts".*

b. FRAP 27 provides specific authority for the filing of Motions within the power of the court to grant.

c. Local Rule 27.0 et seq provides further guidance for the filing of this motion.

d. Significant federal appellate case law, cited below, provides precedent and necessity for granting this motion.

e. Local Rule 27.7 provides for Expedited Consideration.

3. Grounds.

a. Amending the trial complaint to demonstrate that the court has jurisdiction over the complaint on the basis of diversity of citizenship under **28 USC 1332** simplifies the questions to be resolved by the Appellate Court. All counts which the trial court considered as before it by Supplemental Jurisdiction under 28 USC 1367 and which were subject to discretionary dismissal become instead "core" issues. The appeal need not decide whether the trial court's exercise of discretion in dismissing those supplemental counts was unreasonable, and the likewise the parties need not brief that issue.

b. The facts as stated in the complaint satisfy the citizenship and amount in controversy requirements of 28 USC 1332(a).

> *"28 SEC. 1332. - Diversity of citizenship; amount in controversy; costs. (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between - (1) citizens of different States;"*

(1) Prior to the statement of jurisdiction and venue, the complaint stated the following:

> ***"PARTIES***
>
> *2. The Plaintiff, RONALD E. JARMUTH, is an adult individual who at times relevant to this action resided at 1703 Lakeside Drive, Morgantown, West Virginia 26508.*
>
> *3. Upon information and belief, the Defendants J Frinzi and Waters, reside together at House #2, Deer Lake Road, Chalk Hill, PA 15421.*

This is also the business address for defendant J Frinzi.

4. Upon information and belief, Defendant Begg resides on valley Drive, Pittsburgh, PA I5215, and at times relevant hereto had a business address of 301 Grant Street, Floor 20, Pittsburgh PA 15219-1410."

(2) This was poorly written because at the time of filing the Complaint Plaintiff was a citizen of West Virginia and all defendants were citizens of Pennsylvania. The facts satisfy the diversity requirements of the statute. Plaintiff proposes to amend the complaint so that to paragraph 2 is appended the phrase, "and is a citizen of West Virginia.". Paragraph 3 will be amended to append the sentence "Frinzi and Waters are citizens of Pennsylvania". Paragraph 4 will be amended to append the sentence "Begg is a citizen of Pennsylvania"..

c. Jurisdiction is a matter of the application of the law to the facts of the case. It can not be waived nor achieved by the consent of the parties nor by the quality of how the pleadings are written.

d. **Rule 8(a)** of the Federal Rules of Civil Procedure require only a recitation of the facts which invoke federal jurisdiction; they do not require citation of any particular statute, nor do they state with particularity the form in which the invocation of jurisdiction must be written.

"Rule 8. General Rules of Pleading. (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it"

(1) In the Complaint, Counsel for Plaintiff overlooked that diversity jurisdiction existed and recited the statutes for jurisdiction on the basis of a federal question, 28

USC 1331, and through supplemental jurisdiction, 28 USC 1367. Where multiple bases for jurisdiction exists reciting the alternative bases is surplus and does not destroy alternative bases for jurisdiction.

> *"JURISDICTION AND VENUE*
>
> *5. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331 and 1367. Venue is proper in this judicial district pursuant to 28 U.S.C. §§1391(b). This Court has personal jurisdiction over each of the defendants."*

(2) Plaintiff proposes to amend the complaint so that the phrase reciting the statutes is altered to read

> *"pursuant to 28 U.S.C. §§1331, 1332 and 1367. The amount in controversy is at least $391,312 and exceeds $75,000."*

(3) As filed, the amount in controversy is at least $391,312.00. Since the time the complaint was filed additional instances of violation of the state and federal wiretap statutes have been identified and are provable through verified court papers filed by Defendant James Frinzi in a state case (to which Plaintiff is NOT a party) in West Virginia which occurred after the federal case was filed and which significantly increases the amount in controversy.

(a) In Count I Plaintiff recites five (5) instances of wiretap violation by James Frinzi and by Katie Waters which, under the federal statute, have an automatic civil amount recoverable by the injured party of $10,000 per occurrence per perpetrator. Count I also recites at least two (and alleges more) additional violations by Katie Waters alone. These add up (collectively) to statutory damages of at least $120,000. In addition, both the state and federal wiretap statutes provide for the injured party to recover all attorneys fees and costs. Before the Complaint was dismissed actual legal costs of over $21,000 had been borne by Plaintiff and were recoverable, not an unreasonable

amount considering the number of defendants and the complexity of the issues raised.

(b) Count III alleges that Defendant Begg committed multiple violations of the wiretap statutes in August, 2000, by revealing the contents of the wiretap tapes in his state court (not this federal case) motions, each of which carries statutory damages of $10,000.

(c) Count V alleges that each of the seven violations (five for James Frinzi, seven for Katie Waters) of Count I also constituted an Invasion of Plaintiff's privacy and asked for the same amount of damages (as additional, not alternative amounts) as were plead in Count I – an additional $120,000.

(d) Count VI similarly alleged that the actions set forth in Count I are defamations of Plaintiff and, as in Count V, asked for additional damages in the same form as Count I – an additional $120,000.

(f) Thus the total amount in controversy set forth in the complaint is at least $391,312, well over the statutory threshold.

e. Appellant is of the belief that a motion to amend the jurisdictional statement per 28 USC 1653 at the appellate level must be made prior to filing the Briefs.

f. Amending the complaint reduces the issues to be briefed to the Appellate Court essentially to whether Plaintiff's allegation supported by facts that Defendants committed numerous state law felonies (19 Pa.C.S. 5703, Plaintiff setting forth the specifics of the violations) invoked the restriction on the "one party exception" in paragraph (d) of 18 USC 2511 which exception the trial court depended upon in dismissing the complaint. In other words, if the facts which alleged a federal wiretap violation also constitute a state court crime of any nature, the "one party" exception does not apply and the federal wiretap violation was improperly dismissed by the trial court.

"18 USC 2511. (d) <u>It shall not</u> be unlawful under this chapter for a person not acting under color of

law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."

The facts alleged by Plaintiff describe numerous state law felonies "of the third degree", **18 PC § 5703.**

4. Case law.

a. In *First Franklin Financial Corp v Gary McCollum*, No. 97-6966 in the United States Court of Appeals for the Eleventh Circuit, decided June 8, 1998 (#1 in Exhibit A, Case Law), the appellate court stated that even without a clear statement of diversity jurisdiction

"there is undoubtedly diversity in that underlying dispute. There is, therefore, federal subject matter jurisdiction over the petition.

Once such jurisdiction exists, federal courts have a "virtually unflagging obligation" to exercise it. Moses H. Cone, *460 U.S. at 15, 103 S.Ct. at 936 (quoting* Colorado River Water Conservation Dist. v. United States, *424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976), in turn quoting* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., *342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)).*"

b. In *Guarantee National Title Company v J.E.G. Associates*, No. 96-1089 in the United States Court of Appeals For the Seventh Circuit, decided November 15, 1996, the Appellate Court actively advised the parties to correct the jurisdictional defects in the trial court complaint. The appellate decision stated that

"the lack of detail led us to require the parties to file additional jurisdictional memoranda. At oral argument we told counsel that it is essential to put

into the record the name and citizenship of each partner. ... One of the appellate lawyers said at oral argument that J.E.G.'s partners are "residents" of Massachusetts. ... A judge intervened to remind counsel that citizenship is what matters."

If due process requires an appellate court to actively intervene and guide the parties to the correction of their jurisdictional allegations it is entirely proper for the plaintiff, under 28 USC 1653, to make such correction himself.

c. In Lander Company v MMP Investments No. 96-2684 in the United States Court of Appeals for the Seventh Circuit, 107 F.3d 476; 42 U.S.P.Q.2D (BNA) 1393, February 18, 1997, decided, the appellate court made the observation that jurisdiction depends on the facts of the case and not in how the plaintiff pleads it – incorrect allegations of jurisdiction does not invoke it and defective statements does not waive it. The court wrote:

"The court either has jurisdiction or it does not. If it is pretty obvious that it has jurisdiction, the failure to cite the right statute is harmless and ought not lead to a forfeiture ... A plaintiff typically makes a selection on tactical grounds from a menu of possible grounds for asserting liability, and the district judge is in no position to guess which omitted grounds were omitted by sheer oversight and ought to be restored later. ... a "waiver" of jurisdiction in the sense not of a deliberate choice to forgo basing jurisdiction on a particular statute but of an inadvertent failure to cite the statute (so "forfeiture" is the better term than "waiver") is entitled to less weight than a waiver of a substantive ground for relief. Glisson v. U.S. Forest Service, *55 F.3d 1325, 1328 (7th Cir. 1995);* Buethe v. Britt Airlines, Inc., *749 F.2d 1235, 1238-39 (7th Cir. 1984); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1210, pp. 121-22 (2d ed. 1990)."*

The court insightfully pointed out the distinction between selection of causes of action, which a plaintiff can make, and jurisdiction, which is not subject to plaintiff choice.

d. In *Ross Brothers Construction Co. v International Steel Services, Inc. and American Iron Oxide Company*, No. 01-1578 in the United States Court of Appeals for the Seventh Circuit, 283 F.3d 867;2002 U.S. App. LEXIS 4301;52 Fed. R. Serv. 3d (Callaghan) 271, decided March 18, 2002, the Seventh Circuit again actively intervened to guide the parties in the correction of the trial complaint so as to correct defects in the statement of diversity jurisdiction where the facts might support it. In the decision the appellate court wrote:

> *"After a preliminary review of the short record in this case, we discovered two potential jurisdictional problems and ordered the parties to brief the issues."*

The appellate briefs of the parties, not the trial complaint and answer, were the basis for a decision as to whether diversity existed - based upon facts introduced at the appellate level after the trial court's final order. 28 USC 1653 exists to permit a plaintiff to demonstrate, through a clarification of the language of a complaint, that the facts do invoke diversity jurisdiction, saving the appellate court the burden of inquiry through supplemental briefs or otherwise.

e. The amendment of pleadings allowed by 28 USC 1653 to remedy deficiencies in jurisdictional allegations so as to clarify citizenship and amount in dispute allegations so as to properly invoke 28 U.S.C. § 1332(a) has been held to be a "procedural", not a "jurisdictional" amendment. In *Robert Lee Tate II v Werner Company*, No. IP02-0031-C-T/K in the United States District Court for the Southern District of Indiana (Indianapolis Division), the court wrote (the Court indicated that this decision is to be made available for citation):

> *"Werner's failure to properly allege the parties' citizenship and the jurisdictional amount in its*

*notice of removal can plainly be characterized as a procedural defect. If permitted to amend its notice, Werner would merely be provided the opportunity to correctly state his original jurisdictional grounds that the amount in controversy is sufficient and the parties are sufficiently diverse. As such, allowing Werner to correct its procedural deficiencies and properly allege the elements of diversity jurisdiction by amendment is appropriate. See, e.g., Harmon v. OKI Sys., 902 F. Supp. 176, 177 (S.D. Ind. 1995) (Hamilton, J.) (allowing amendment of removal petition when required jurisdictional amount was omitted and allegations of citizenship were deficient), aff'd, 115 F.3d 477 (7th Cir. 1997); Poulos v. Naas Foods, Inc., 959 F.2d 69, 70 n.1 (7th Cir. 1992) (allowing amendment of removal petition to correct a deficient allegation of the citizenship of the parties); Pickett v. Allstate Ins. Co., 2000 WL 33125130, at *1 (S.D. Ind. 2000) (Tinder, J.) (allowing amendment when "defects in the removal notice were procedural and, thus, did not undermine jurisdiction").*

5. Affidavit. Appellant affirms that the statements made above are true to the best of my personal knowledge, information and belief, and that Appellant is competent to testify to the matters stated herein.

6. Prayer for Relief: Appellant / Plaintiff (below) Ronald Jarmuth thus moves this honorable court for an order amending the trial court complaint as proposed in this motion.

/s/ Ronald E. Jarmuth
Ronald E. Jarmuth, Appellant Pro Se in Appeal
31 Wexford Way
Bridgeport, WV 26330
304-842-0878

TABLE OF CASES

1. *First Franklin Financial Corp v Gary McCollum*, No. 97-6966 in the United States Court of Appeals for the Eleventh Circuit,
2. *Guarantee National Title Company v J.E.G. Associates*, No. 96-1089 in the United States Court of Appeals For the Seventh Circuit.
3. *Lander Company v MMP Investments* No. 96-2684 in the United States Court of Appeals for the Seventh Circuit, 107 F.3d 476; 42 U.S.P.Q.2D (BNA) 1393.
4. *Ross Brothers Construction Co. v International Steel Services, Inc. and American Iron Oxide Company*, No. 01-1578 in the United States Court of Appeals for the Seventh Circuit, 283 F.3d 867;2002 U.S. App. LEXIS 4301;52 Fed. R. Serv. 3d (Callaghan) 271.
5. *Robert Lee Tate II v Werner Company*, No. IP02-0031-C-T/K in the United States District Court for the Southern District of Indiana (Indianapolis Division).

Petitioner's Unopposed Motion for Reconsideration of his Motion to Amend Jurisdictional Statement

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-2630

Jarmuth

Vs.

Frinzi

APPELLANT's MOTION TO AMEND TRIAL COURT PLEADINGS TO SHOW JURISDICTION

EXPEDITED CONSIDERATION REQUESTED

Filed By Appellant Ronald Jarmuth, Pro Se

1. **Relief Sought**.

a. Appellant Ronald Jarmuth moves the Appellate Court to reconsider it's Order on this matter entered April 10th, 2003, and to enter an order (per 28 USC 1653) correcting a defective allegation of diversity jurisdiction.

b. Appellant requests "Expedited Consideration", as Appellant's brief (unless the filing schedule has been extended) is due May 5th, 2003, and if the court recognizes that diversity jurisdiction has in fact been present all along, the arguments to be plead will be substantially different.

c. Appellant further suggests that this matter is appropriate for Summary Action per Local Rule 27.4, as no substantial question must be decided in order to grant the relief that Appellant seeks.

2. **Authorities**.

a. **28 USC 1653. Amendment of Pleadings to Show Jurisdiction.**

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts".

b. Local Rule 27.4, Motions for Summary Action. *"A party may move for summary action affirming, enforcing, vacating, remanding, modifying, setting aside or reversing a judgment, decree or order, alleging that no substantial question is presented"*

c. FRAP 40, Petition for Panel Rehearing.

d. Local Rule 40.1, Petition for Panel Rehearing.

3. Grounds.

a. The Appellate Court entered it's Order denying Appellant's original motion without comment or explanation.

b. Correction of an order by reconsideration is appropriate if an order is contrary to the prior standards and practice of a particular circuit, or if it is in juxtaposition to the standards and practices of other circuits and of the United States Supreme Court as exemplified in their cited cases. Such is present here.

c. The appellate courts have uniformly held that it is an abuse of discretion not to grant a 28 USC 1653 jurisdictional allegation when it is clear that the facts support federal judicial jurisdiction and a plaintiff makes such a request. The same standard which this Appellate Court imposes on the trial (district) courts within this circuit is applicable when such a motion is made, as is allowed by the statute, at the appellate level.

d. While the statute contains the term "may", which is discretionary, it appears that the discretion lies with the plaintiff to make such a motion, or in the alternative in the trial or appellate courts to make such a motion on behalf of a plaintiff so as to perpetuate the case. When no case may be found where an appellate court upheld a trial court's refusal to grant such a 28 USC 1653 motion, and where no appellate court overturned a trial court's granting such a

motion (on appeal by a defendant), the conclusion is that granting such a motion is mandatory where the facts have been present supporting a "corrected" jurisdictional allegation from the moment a case has either been filed. The only cases where 28 USC 1653 motions have been rejected is where, after a case has been filed, a plaintiff has attempted to create new jurisdictional facts (e.g., by moving to a different state). And even this is tempered by the fact that the rules and cases support granting a 28 USC 1653 motion after a non-essential plaintiff or defendant has been struck so as to rectify a problem where complete diversity is lacking.

e. It is transparently clear that the purpose of the statute, 28 USC 1653, is to enable a plaintiff to continue proceedings when a jurisdictional allegation, but not the facts supporting jurisdiction, are defective in some manner. This statute is unlike most of the rules and other procedure - related statutes in that it expressly provides a plaintiff a means of correcting defects so as to continue a proceeding, whereas other rules and statutes, such as those involving original service of process, provide natural barriers and routes enabling ending a proceeding. 28 USC 1653 is available to a plaintiff whereas many of the other rules and statutes are provided in aid of a defendant or the court to terminate litigation.

f. It is also well established that it is the duty of both the trial and appellate courts to inquire into any alternative bases of jurisdiction (when a plead basis is in question) and it is further the duty of the courts to allow plaintiff's to utilize 28 USC 1653's mechanism to correct procedural defects in pleading when the facts support jurisdiction.

4. Relevant Facts Alleged in the Complaint.

a. It is an uncontested matter of record that at the time the tortious conduct took place all defendants were citizens of Pennsylvania and Plaintiff was a citizen of West Virginia. This continued to be the case when the complaint

was filed and the citizenship of the parties remains unchanged through today.

b. The facts as stated in the complaint satisfy the citizenship requirements of 28 USC 1332(a) such as is necessary to demonstrate that the Courts have jurisdiction on the basis of diversity.

Prior to the statement of jurisdiction and venue, the complaint stated the following:

> ***"PARTIES***
>
> *2. The Plaintiff, RONALD E. JARMUTH, is an adult individual who at times relevant to this action resided at 1703 Lakeside Drive, Morgantown, West Virginia 26508.*
>
> *3. Upon information and belief, the Defendants J Frinzi and Waters, reside together at House #2, Deer Lake Road, Chalk Hill, PA 15421. This is also the business address for defendant J Frinzi.*
>
> *4. Upon information and belief, Defendant Begg resides on valley Drive, Pittsburgh, PA I5215, and at times relevant hereto had a business address of 301 Grant Street, Floor 20, Pittsburgh PA 15219-1410."*

Appellant / Plaintiff sought, and seeks, not to create diversity jurisdiction but to merely document that it exists, by amending to note that Plaintiff is and was a citizen of West Virginia and that all defendants were and are citizens of Pennsylvania.

c. Where individuals are concerned state residence is synonymous with state citizenship. While there are many documents which can be obtained showing state residence there is no document which one can apply for showing state citizenship. One sheds it and obtains it by conduct and representation, not by application. 28 USC 1653 is a statute which recognizes this murky domain of residence and citizenship, and provides a remedy available to plaintiffs as of right so as to reconcile either a poorly written allegation of jurisdiction with the constitutional limitations

of the jurisdiction of federal courts OR to enable a plaintiff to select an alternative basis for jurisdiction - well into the case (even at the appellate level) - where a court determines that the facts do not support a federal question allegation of jurisdiction (e.g., where diversity exists but jurisdiction on the basis of admiralty law is plead and it is found that the particular stretch of river is not navigable).

d. Amount in dispute.

As filed, the amount in controversy is at least $391,312.00. The details are contained in the original motion to amend. This satisfies the amount in dispute provision of the diversity statute.

5. **Case law.**

a. **Duty of Court** to Permit Correction of Jurisdictional Allegation.

(1)The Supreme Court of the United States, in Newman-Green, Inc. v. Alejandro Alfonzo-Larrain, et al, No. 88-774, June 12, 1989, 490 U.S. 826; 109 S. Ct. 2218; 104 L. Ed. 2d 893, stated that

> *"every Court of Appeals that has considered the scope of § 1653 has held that it allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts. n5 We decline to reject this long-standing interpretation of the statute."*

The Supreme Court pointed out that the current wording of the statute was enacted specifically to expand the tools available to plaintiffs to cure defective jurisdictional pleadings.

In Newman-Green, the Court held that allowing the plaintiff to amend was

> *"necessary to establish the existence of a justiciable case"*

which the plaintiff was entitled to do.

The Supreme Court noted that the right of plaintiffs to cure defective predates the Federal Rules and actually arises from "the course of the common law", pointing to an

1812 case decided by Justice Story (*In Anonymous*, 1 F. Cas. 996, 997, No. 444, CC Mass. 1812) in which Justice Story relied on the common law as he identified it in *King v. Ponsonby*, 1 Wils. 303, 95 Eng. Rep. 631, K. B. 1751.

(2) The Supreme Court, in another case, Willingham, Warden et al v Morgan, No. 228, June 9, 1969, 395 U.S. 402; 89 S. Ct. 1813;23 L. Ed. 2d 396, held that when a court comes into possession of a knowledge of jurisdictional facts through affidavits or pleadings other than a complaint,

> *"it is proper"*, under 28 USC 1653, *"to treat the (complaint) removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits"*.

It is clear that the message is that the duty of the court, if it becomes aware from any documents of the fact of jurisdiction, is to amend so as to respect the actual existence of jurisdiction".

(3) The Eleventh Circuit, in In re First National Bank of Boston, No. 95-5008, (Nov. 30, 1995, 102 F.3d 1577) held that it is the duty of a Court of Appeals to assure that a Plaintiff be allowed to modify an allegation of jurisdiction so as to avoid dismissal, stating that if the Appellate Court did not allow such a modification (at the appellate level):

> *(we) "would be shirking our review responsibility and would result in an injustice for Bank of Boston in the selection of its federal forum. The district court's wrongful remand should not be shielded and effectuated by our refusal to perform our review responsibility to the disadvantage of Bank of Boston, a litigant expecting the federal courts to review its case fairly."*

(4) The Second Circuit, in Le Blanc v Cleveland, No. 98-9020 (May 04, 2001, 248 F.3d 95) held "that it was an abuse of discretion to deny" a plaintiff's attempt to correct a defective jurisdictional allegation where the facts of jurisdiction are subsequently stated by the moving plaintiff.

(b) **Intent of 28 USC 1653.** Federal practices, as exemplified by appellate decisions, uniformly concludes that the intent of 23 USC 1653 is to provide a procedure which a plaintiff is entitled to utilize at any stage in judicial proceedings, even at the Supreme Court level.

(1) The Supreme Court of the United States, in Mathews, Secretary of Health, Education and Welfare v Diaz et al, No. 73-1046, June 1, 1976, 426 U.S. 67, 77, 96 S. Ct. 1883, 1890, 48 L. Ed. 2d 478 (1976), held that a plaintiff is entitled to eliminate a defective allegation of jurisdiction even at the Supreme Court stage of the appellate process, and that this would relate back to the filing of the complaint in the trial court. The Supreme Court instructed Circuit and District Courts that

> *"the statutory purpose of avoiding needless sacrifice to defective pleading applies".*

The court noted that if a court is aware of facts (through supplemental pleadings or otherwise) which satisfy a jurisdictional requirement, no matter how defective the allegation of jurisdiction, such a court is required to take such action as to allow the suit to proceed.

(2) In another case decided by the Supreme Court, Schlesinger, Secretary of Defense, Et Al, v Councilman, No. 73-662, March 25, 1975, 420 U.S. 738;95 S. Ct. 1300;43 L. Ed. 2d 591; 21 Fed. R. Serv. 2d (Callaghan) 1029, (footnote 9), the Supreme Court held that if outside of the formal complaint

> *"The facts alleged and the claim asserted nonetheless were sufficient to demonstrate the existence of a federal question"*

then a plaintiff is entitled to cure a defective demonstration of jurisdiction and proceed, and it so ordered (even though, as the court pointed out in this case, the complaint did not contain a proper allegation of the amount in controversy).

(3) This Circuit (the Court of Appeals for the Third Circuit), has followed the Supreme Court's lead in this

regard. In Eileen Anne Neely v Club Med Management Services, et al,
Nos. 93-2069 and 93-2102, July 26, 1995, 63 F.3d 166, 174 (3d Cir. 1995)(en banc), this court on it's own amended the jurisdictional basis of the complaint, reversing the trial court's dismissal of the case. Diversity had not been plead but this court wrote that pleadings made it known to the court that "the facts show that the district court had diversity jurisdiction". This court granted the amended allegation of jurisdiction, writing that a further reason for amending was

> *"to avoid the great waste of judicial resources that would otherwise attend the plaintiff's having alleged only two bases for jurisdiction (federal question and admiralty), rather than three (those plus diversity)".*

(4) The Court of Appeals for the Second Circuit, in Joseph J. Jacobs (Trustee of the Jacobs Family Trust) et al v Patent Enforcement Fund, Inc, No. 99-9237, September 27, 2000, 230 F.3d 565, asked the question (regarding defective pleadings of jurisdiction) as to (at the appellate level):

> *"whether plaintiffs may cure the defect in their pleadings at this late stage"*

holding that "We conclude that plaintiffs can indeed do this". The Court went on to explain

> *"that while a complaint must present certain quite particular allegations of diversity jurisdiction in order to be adequate, the actual* existence *of diversity jurisdiction,* ab initio, *does not depend on the complaint's compliance with these procedural requirements."*

Saying further that "It is also the only conclusion consistent with the actual practice of our court...". The Court thus concluded

> *"that the defect in plaintiffs' pleadings does not negate jurisdiction and that, since it has been established that the requisite diversity existed at the time of the initial pleadings"*

and reinstated the appellant plaintiff's case at the trial court, overturning the trial court's refusal to allow amendment of the jurisdictional pleadings.

(c) **Standard to be used in considering Motion to Amend Jurisdictional Statement.**

(1) The Court of Appeals for the Second Circuit, in Advani Enterprises Inc v Underwriters at Lloyds and Syndicate 735, No 97-7664, March 20, 1998, 140 F.3d 157, stated

> *"We have consistently recognized that section 1653 should be construed "liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist."* John Birch Soc'y, *377 F.2d at 198-99.* Accord Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co., *700 F.2d 889, 893 (2d Cir. 1983) (citation omitted);* Cox v. Livingston, *407 F.2d 392, 393 (2d Cir. 1969)"*

The Second Circuit went on to cite *Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 84-85 (2d Cir. 1990, quoting:

> *"This court must liberally construe plaintiffs' complaint 'to determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded.'"*

The Second Circuit stated that if the facts (are) sufficient to invoke the court's jurisdiction, a plaintiff is entitled to amend its complaint to assert federal jurisdiction, and so ordered.

(2) In another Second Circuit case, Le Blanc v Cleveland, (op. cit.), the appellate court restated that a plaintiff's motion to amend a jurisdictional statement to avoid a dismissal "should be liberally construed".

(3) The Court of Appeals for the Eleventh Circuit, in In re First National Bank of Boston, No. 95-5008, 102 F.3d 1577; 10 Fla. L. Weekly Fed. C 589, wrote that

""any qualms" that the district court had concerning diversity jurisdiction should have been resolved "by allowing Allstate to amend the removal petition to cure the defect under 28 U.S.C. § 1653""

and reversed the "clearly incorrect remand" to the state court. It is clear that the appellate court was applying an abuse of discretion standard.

(d) **Nature of Defective Jurisdictional Allegation and Effect of Amendment.**

Both the appellate courts and the Supreme Court of the United States have uniformly held that a flawed jurisdictional allegation is a procedural error, not a jurisdictional defect.

(1) The Second Circuit, in Joseph J Jacobs v Patent Enforcement Fund, op.cit., held that a defective allegation of jurisdiction does not deprive the court of jurisdiction but should instead result in procedural steps to remedy the procedural error, rather than dismissal. The court wrote:

"we hold that while a complaint must present certain quite particular allegations of diversity jurisdiction in order to be adequate, the actual existence *of diversity jurisdiction,* ab initio, *does not depend on the complaint's compliance with these procedural requirements. This is the only conclusion consistent with the established practice that when a defendant moves, under Fed. R. Civ. P. 12(b)(1), to dismiss a complaint that inadequately pleads diversity jurisdiction (under circumstances in which extrinsic or subsequently adduced evidence shows that diversity exists), then the court "may [either] deny the motion and direct the pleader to amend, or it may dismiss with leave to amend." 5A Charles A. Wright & Arthur R. Miller,* Federal Practice and Procedure *§ 1350 at 223 (2d ed. 1990) (footnote omitted)."*

> *"If adequate pleadings of diversity were themselves an essential element of diversity jurisdiction, then the first of these alternatives could not be available to the courts, for they would have no jurisdiction on which to base their orders to amend and could not create jurisdiction* nunc pro tunc".

The appellate court held that diversity jurisdiction existed,

> *"since it has been established that the requisite diversity existed at the time of the initial pleadings"*

and reinstated the case.

(2) The Eleventh Circuit, in In Re First National Bank of Boston, op. cit., endorsed the finding of the Fifth Circuit (in *In re Allstate*, 8 F.3d at 221) that

> *"that failure to allege the plaintiff's citizenship at the time of filing the removal notice was a "procedural, rather than [a] jurisdictional, defect.""*

It held that the proper course for a court to follow when it encounters a procedural defect is a procedural remedy, not dismissal.

(3) The Second Circuit, in Etoile Le Blanc v Terry Cleveland, op. cit., pointed out that when a plaintiff presents such facts as will cure a defect in jurisdictional pleadings, the result to the complaint is as if "the defect as having been eliminated from the outset of the action".

6. **Affidavit.** Appellant affirms that the statements made above are true to the best of my personal knowledge, information and belief, and that Appellant is competent to testify to the matters stated herein.

7. **Prayer for Relief**: Appellant / Plaintiff (below) Ronald Jarmuth thus moves this honorable Court for an order (reversing it's original consideration of Appellant / Plaintiff's 28 USC 1653 motion) amending the complaint so as to reflect that the facts from the outset support diversity jurisdiction.

/s/ Ronald E. Jarmuth
Ronald E. Jarmuth, Appellant Pro Se in Appeal

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304-842-0878

TABLE OF CASES

1. Advani Enterprises Inc v Underwriters at Lloyds and Syndicate 735, No 97-7664 in the United States Court of Appeals for the Second Circuit, March 20, 1998. 140 F.3d 157.
2. In re First National Bank of Boston, No. 95-5008 in the United States Court of Appeals for the Eleventh Circuit, 102 F.3d 1577; 10 Fla. L. Weekly Fed. C 589.
3. J & R Ice Cream Corporation v California Smoothie Licensing Corporation, Nos. 93-5516 and 93-5547, in the United States Court of Appeals for the Third Circuit, August 4, 1994, 31 F.3d 1259, 1265 n.3.
4. Joseph J. Jacobs (Trustee of the Jacobs Family Trust) et al v Patent Enforcement Fund, Inc, No. 99-9237 in the United States Court of Appeals for the Second Circuit, September 27, 2000, 230 F.3d 565.
5. Etoile Le Blanc v Terry Cleveland, No. 98-9020, in the United States Court of Appeals for the Second Circuit, May 04, 2001, 248 F.3d 95.
6. Mathews, Secretary of Health, Education and Welfare v Diaz et al, No. 73-1046 in the United States Supreme Court, June 1, 1976, 426 U.S. 67, 77, 96 S. Ct. 1883, 1890, 48 L. Ed. 2d 478 (1976).
7. Eileen Anne Neely v Club Med Management Services, et al, Nos. 93-2069 and 93-2102 in the United States Court of Appeals for the Third Circuit, July 26, 1995, 63 F.3d 166, 174 (3d Cir. 1995)(en banc).
8. Newman-Green, Inc. v. Alejandro Alfonzo-Larrain, et al, No. 88-774 in the United States Supreme Court, June 12, 1989, 490 U.S. 826; 109 S. Ct. 2218;104 L. Ed. 2d 893.
9. Schlesinger, Secretary of Defense, Et Al, v Councilman, No. 73-662 in the United States Supreme

Court, March 25, 1975, 420 U.S. 738;95 S. Ct. 1300;43 L. Ed. 2d 591; 21 Fed. R. Serv. 2d (Callaghan) 1029.

10. Willingham, Warden et al v Morgan, No. 228 in the United States Supreme Court, June 9, 1969, 395 U.S. 402; 89 S. Ct. 1813;23 L. Ed. 2d 396.

FRCivP 15. Amended and Supplemental Pleadings
(a) Amendments.
A party **may amend** the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.
Otherwise a party **may amend** the party's pleading **only by leave of court** or by written consent of the adverse party; **and leave shall be freely given** when justice so requires.